Nik Ti died some time after the date of the agreement, and Nik Mohamed Salleh bin Nik Mohamed Tahir is the administrator of her estate. A grant of letters of administration to the estate of Nik Abdul Majid bin Nik Mohamed Tahir was issued to the official administrator who, in the process of winding up that estate, transferred the land in question to Nik Mohamed Salleh as administrator. The land thus became the sole property of the estate of Nik Ti deceased.

In the event, Tengku Besar Zabidah as plaintiff brought an action in the High Court at Kota Bharu against Nik Mohamed Salleh, Nik Mah and Nik Mohamed Nawi as the first, second and third defendants respectively, and obtained an order requiring the first defendant to execute a transfer of the land to the plaintiff by way of specific performance of the sale agreement.

In my judgment the High Court was quite right in ordering specific performance of the sale agreement. This is clear from the following passage in the judgment of the Lord Chancellor (Lord Westbury) in *Holroyd* v. *Marshall*[8]:

"... if a vendor .. agrees to sell .. property .. of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, ... For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained."

The above principle was followed in *Pundlik Daryaji* v. *Jainarayan Maliram Shop*.[9]

It was contended that the agreement was void in that the other beneficiaries of the estate of Nik Abdul Majid had not joined in the agreement. I do not think I can accept that contention. The agreement was valid as between the purchaser and the three beneficiaries who were parties to the agreement, and so long as the land eventually got vested in any one of them the court could order specific performance. This is clear from section 17(a) of the Specific Relief (Malay States) Ordinance, 1950 which provides as follows: —

"17. Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this Chapter) has the following rights —

(a) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;"

And, section 44(1) of the Contracts (Malay States) Ordinance, 1950 says that "when two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise."

As regards the question as to whether the first defendant as administrator was rightly sued, section 8(1) of the Civil Law Ordinance, 1956 provides that "subject to the provisions of this section, on the death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate". The proviso to that section does not apply to the present case. Furthermore, section 43 of the Contracts (Malay States) Ordinance, 1950 provides that "when two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise." Thus, that a contract made by a person can be enforced against the administrator of his or her estate is clear beyond doubt (see also *Kennewell* v. *Dye*[10] and *Siah* v. *Tengku Nong*[11]). In the present case, there appeared to be no special circumstances which made it wrong to grant specific performance of the agreement (see *Abdul Karim Basma* v. *Weekes*[3]).

One of the grounds of appeal in the present case is that the learned judge was wrong in law in refusing to award liquidated damages in lieu of specific performance as stipulated in the agreement. I do not think there is any substance in that ground. Section 19 of the Specific Relief (Malay States) Ordinance, 1950 provides that "a contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same."

Ali F.J. concurred.

Appeal dismissed.

Solicitors: *Jega & Co.; Rithauddeen & Aziz.*

LEE HOY & ANOR. v. CHEN CHI

[F.C. (Azmi L.P., Gill and Ali F.JJ.) October 12, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 47 of 1970]

Land Laws — Contract — Sale of land — Application for rescission of contract — Whether compensation may be awarded where rescission refused — Specific Relief (Malay States) Ordinance, 1950, s. 18.

The defendants/appellants had entered into an agreement with the plaintiff/respondent for the sale of a piece of land held under an approved application. The area of the land was not stated in the agreement, but the option for sale signed by the appellants was for 9 acres and the approval of his application for the land was to the extent of 9 acres. The price was calculated at $2,200 an acre and the consideration for the sale was stated to be $16,300. When the document of title was eventually issued, it was found that the area of land was only 5.281 acres. The respondent thereupon applied for rescission of the contract and for the refund of $6,794.20 from the appellants. The learned trial judge dismissed the application for rescission as he found that there had been no misrepresentation by the appellants. He held however that as the respondent had paid for 9 acres it would not be fair that he should have only 5 acres without any compensation and he therefore ordered the refund of $6,794.20 to the respondent, acting on the provisions of the Specific Relief (Malay States) Ordinance. The defendants appealed.

Held, allowing the appeal: the court can only award compensation under section 18 of the Specific Relief (Malay

States) Ordinance in a case where the plaintiff asks for specific performance and as in this case the respondent did not ask for specific performance, the learned trial judge was wrong in ordering the payment of compensation.

Case referred to:-

(1) *Ardshir Mamma* v. *Flora Sassoon* A.I.R. 1928 P.C. 208; 111 I.C. 413.

FEDERAL COURT.

Miss Cheong Kah Leong for the appellants.

T. C. Tang for the respondent.

Cur. Adv. Vult.

Azmi L.P.: This is an appeal by the defendants against the judgment of the High Court at Kuala Lumpur where the plaintiff claimed

(a) for the recission of an agreement made between them and the return of $16,300, or alternatively;

(b) for the refund of $6,794.20 from the defendants.

The defendants under an agreement dated 31st May 1966 assigned to the plaintiff a piece of land held by them under an approved application No. 3/60 formerly approved application No. 68/57 in the Mukim of Sabai in the district of Bentong for consideration of $16,300 which was fully paid on the signing of the said agreement. Under the said agreement the plaintiff was authorised to occupy and develop the said land. The area of the land is not stated in the said agreement. It was, however, stated in the Collector of Land Revenue's letter of 5th September 1957 (Exh. P.4) that the first defendant's application was approved to the extent of 9 acres, and the option signed by the defendants (Exh. P.2) for sale was 9 acres. and the price was $2,200 for an acre. The purchase price ultimately paid was based on the acreage of the land.

At the time the agreement was signed the defendants also executed an irrevocable power of attorney in favour of the plaintiff, giving him authority to apply for and receive the document of title to the said land as may be issued by the Government and also authority to transfer the said land to himself or to anyone else he wished.

The plaintiff went into occupation of the land and developed it. Subsequently, however, when he received the document of title issued for the land he found that the area of the said land was only 5.281 acres and not 9 acres as expected by both the parties.

After receiving the document of title the plaintiff attempted to recover from the defendants a refund of the purchase price occasioned by the shortage of the acreage. This failed: with the result that the plaintiff brought this suit against the defendants for the recission of the contract on the ground of misrepresentation. In the alternative he also claimed for part of the price of the land paid by him by reason of the shortage of the area.

The learned judge found as a fact that there was no misrepresentation as alleged because the plaintiff himself could well see from the approved application which was handed to him by the defendants for inspection that the right to expect title of the land under the application was subject to the risk of title being given to land less than the acreage stated in the application.

The learned trial judge, however, went on to say that the plaintiff having paid for 9 acres it would not be fair that he should have only 5 acres without any compensation, which according to the learned judge he should get under section 18(3) of the Specific Relief (Malay States) Ordinance, 1950.

I will now cite the provisions of the whole section:

"18(1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

(2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

(3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) Compensation awarded under this section may be assessed in such manner as the court may direct.

Explanation — The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section."

Purporting to act under the above provisions the learned judge came to the view that the justice of the case required that the plaintiff should get a refund of $6,794.20, being the amount for the deficiency of acreage of the land.

The appeal was argued before us mainly on the basis that the learned judge was wrong in ordering the refund of $6,794.20. It was first argued that section 18 should apply only to a case where a plaintiff sues for specific performance and/or compensation. This would be apparent from the words "Any person suing for specific performance of contract" appearing in sub-section (1) and again the words "if in any such suit" appearing in sub-section (2) and also illustrations given thereunder.

The Privy Council case of *Ardshir Mamma* v. *Flora Sassoon*[1] it was argued, illustrates how essential it is for the plaintiff to ask for specific performance before any relief can be granted under section 21 of the Indian Specific Relief Act 1963 which corresponds to our section 18. This case was decided under section 19 of the old Indian Specific Act which corresponds to the present Indian section 21. In this case the plaintiff claimed for specific performance of a contract and compensation in addition to or in substitution of that relief. He subsequently gave notice abandoning his claim for specific performance. It was held that except as to the cases provided for in the explanation to section 19 as to which there is introduced an express divergence from Lord Cairn's Act as expounded in England, section 19 embodies the same principles as the English Act and does not, any more than does the English Statute, enable the court in a suit for specific performance to award compensation for breach of the contract where at the hearing the plaintiff has debarred himself by his own action by asking for a decree of specific performance.

In the present case the plaintiff, not only did not ask for specific performance of the contract; he in fact, asked for its recission. It was argued, therefore, there was no basis at all for the award of compensation to him under our section 18(3) of the Specific Relief (Malay States) Ordinance. It was also pointed out that in the instant case, the plaintiff had not asked for specific performance because the defendants had not refused to carry out their part of the contract and in fact they had done all that was required to be done by them. There has therefore been no breach of contract on their part.

It was further submitted that the plaintiff could not recover the sum of $6,794.20 as damages.

For these reasons the defendants prayed that the appeal should be allowed.

The argument on behalf of the plaintiff was to the effect that section 18(3) of the Specific Relief (Malay States) Ordinance should be read with sub-section (4) of the same section and its illustrations. In the explanation to section 18 it is provided that the circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section. It was therefore counsel's submission that the facts of this case fit in nicely with this section and that it did not matter whether the plaintiff had sued for specific performance or not.

In my view this appeal should be allowed. It would appear that the court may award compensation under section 18 of the Specific Relief (Malay States) Ordinance only in a case where the plaintiff asks for specific performance, and the court decides that specific performance ought not to be granted, though there has been a breach of the contract by the defendant, or where though specific performance ought to be granted, but that it is not sufficient to justify the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff. Only in those circumstances may the court award compensation. In the present case, in the first place, the plaintiff did not ask for specific performance, and even if he did, most probably the court would dismiss it because there was nothing that was still required to be done by the defendants under the contract made between them.

Gill F.J.: I agree with the learned Lord President that this appeal be allowed with costs here and in the court below that the order made in the court below be set aside and that there be substituted in its place an order that the action do stand dismissed.

The claim by the respondent as plaintiff in the action to a refund of a part of what might be called the purchase price, which claim was allowed by the court below, was founded on the averment that whereas the land comprised in the approved application was said to be approximately 9 acres, on the basis of which he agreed to pay $16,300 for the assignment to him of the rights under the said application, the area of the land to which he obtained title in pursuance of the application was only 5 acres. The short answer to that is that the agreement between the parties was not an agreement for the sale of 9 acres of land but an agreement whereby the appellants agreed to assign to the respondent their rights and interests in the land comprised in approved application No. 3 of 1960 in the Mukim of Sabai in the District of Bentong.

The approved application was issued under sections 17(b) and 18 of the Land Code (F.M.S. Cap. 138). It is clear from the provisions of those sections that all that was acquired under it was (a) the right to occupy the area set out in the approved application and (b) the right to expect registration of title to some part of the land. Rule 9 of the Pahang Land Rules, 1950 expressly provides that an applicant has no right to registration of title to the whole of the area set out in the approved application. As the learned judge rightly pointed out, the right to expect title to the land under the approved application was subject to the risk of title being given to land less in acreage than the acreage stated in the application.

The appellants allowed the respondent to go into possession of the land and gave him a power of attorney to enable him to obtain a title to the land when it was ready. They had thus fulfilled their obligations under the agreement. There being no breach of the agreement on the part of the appellants, the respondent was clearly not entitled to any compensation. He was also not entitled to a refund of any part of the purchase price because he got what he bargained for. It is not for the court to make a new agreement for the parties.

It was, of course, open to the respondent to ask for a rescission of the agreement, which he did. This part of his claim, however, failed, because there was no evidence whatsoever of fraudulent misrepresentation on the part of the appellants or a mistake on the part of both or one of the parties to the agreement. But the learned trial judge then proceeded to award compensation under section 18(3) of the Specific Relief (Malay States) Ordinance, 1950. With respect, this is where he went wrong, because an award of compensation under that section can only be made if a plaintiff claims specific performance of an agreement and the court decides that in addition to specific performance he should be granted some compensation for breach of the contract in order to satisfy the justice of the case.

Ali F.J.: I agree with the decision to allow this appeal.

The respondent's claim is founded on the allegation that the appellants were guilty of misrepresentation which was denied in the defence statement. The effect of a misrepresentation is, of course, to make a contract void or voidable at the option of the innocent party. The learned trial judge held on the evidence that the appellants were not guilty of any misrepresentation. But he went on to say —

"it would not be fair that the plaintiff should have only 5 acres without any compensation."

So saying, he came to the view that the respondent should get relief under section 18(3) of the Specific Relief (Malay States) Ordinance No. 29 of 1950. There-

upon he ordered the appellants to refund or return to the respondent part of the purchase money amounting to $6,794.20 which, as it appears to me, was the estimated value of the area of land short of the 9 acres. Strictly speaking, a refund is not compensation in the true sense of the word. It is a liability which the vendor undertakes to discharge upon the happening of the event and does not depend upon any breach of contract. No such undertaking can possibly be implied from the contract in this case. A liability to compensate, on the other hand, is one which necessarily arises upon a breach of contract. But no such breach was alleged or pleaded by the respondent. Upon this view of the case, the respondent's claim ought to have failed. But the learned trial judge granted him relief in the nature of compensation under section 18(3) of the Specific Relief (Malay States) Ordinance, 1950.

The controversy before us turns mainly on the effect of section 18 of the Specific Relief (Malay States) Ordinance. This section provides —

"(1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

(2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

(3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) Compensation awarded under this section may be assessed in such manner as the court may direct."

Upon a plain reading of the first three subsections, there cannot possibly be any question that compensation can be asked for by a party to a contract and awarded by the court only in cases where specific performances are claimed. Subsection (1) speaks of the right of the party suing for specific performance to ask for compensation in addition to or in substitution for, specific performance. Subsection (2) deals with the power of the court to award compensation where it considers specific performance claimed ought not to be granted. Subsection (3) contemplates a situation in which both specific performance and compensation, respectively, ought to be granted and awarded because specific performance alone would not be a sufficient remedy. Indeed, sofar as it is clear that no specific performance is claimed in this case, there is no reason or ground for exercising statutory powers to award compensation. This appeal must be allowed.

In the respondent's written submission our attention was drawn to the words of the explanation to section 18 which reads —

"*Explanation* — The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section."

Relying on these words the respondent said —

"It is my submission that the facts of this appeal fit in nicely with this section. It does not matter whether the plaintiff has sued for specific performance or not."

He did not or could not elaborate plainly because he has no arguable case to advance. If I may say so, the object of the explanation is to remove any doubt as might arise with regard to the court's power or jurisdiction to award compensation in circumstances when it is *unable* to make an order of specific performance for reasons mentioned in the two illustrations to the explanation. These clearly speak of circumstances when contracts become *incapable of specific performance.* The first is when the patent sued for expires before the hearing of the suit for specific performance, and the second is when allottment of shares sued for could not possibly be made to the party claiming specific performance. In either case according to the explanation, the court has the power or jurisdiction to award compensation on the basis of non-performance. The explanation has nothing whatsoever to do with any of the subsections, which in terms are so clear and explicit that they do not require any further explanation or construction by this court.

Appeal allowed

Solicitors: *Skrine & Co.; T. C. Tang & Co.*

KOH SHEY GUAN v. LEE KOK CHAN

[F.C. (Azmi L.P., Gill and Ali F.JJ.) October 12, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 55 of 1970]

Land Laws — Contract — Sale of land — Time not essence of contract — No delay by party — Notice to complete — Reasonable time to be given — Deposit — Forfeiture of.

The appellant had entered into a contract to sell to the respondent three pieces of land. The respondent paid $15,000 as "advance towards the purchase price of the said lands." It was agreed that the sale was to be completed when the appellant produced the titles of the said pieces of land which he had applied from the authorities. Subsequently the appellant wrote to the respondent saying that he was in possession of the titles and giving the respondent 14 days to settle the balance of the purchase price and complete the sale. The respondent did not settle the purchase money within the period stipulated in the notice as he had written to the appellant to ask for one month's time to settle the difference. This letter was refused acceptance and was returned undelivered. Later the respondent wrote to the appellant to complete the sale. Getting no response he commenced an action to recover the deposit and damages. The appellant in his defence claimed that he was entitled to forfeit the deposit. The learned trial judge gave judgment for the respondent holding that the 14 days period given in the appellant's notice was insufficient and unreasonably short. On appeal,

Held, dismissing the appeal: (1) as there was no evidence to show that the respondent-purchaser had been guilty of an unnecessary delay, there was no reason for the appellant-vendor to limit the time within which the respondent-purchaser was to complete the purchase;

(2) even if the appellant-vendor had the right to give the notice making time the essence of the contract, the time given was in the circumstances insufficient and unreasonable;

(3) in the circumstances there was no breach of contract which would warrant the forfeiture of the deposit.

Cases referred to:-

(1) *Webb* v. *Hughes* (1870) L.R. 10 Eq. 281.

(2) *Crawford* v. *Toogood* (1879-80) 13 Ch. D. 153.

(3) *Taylor* v. *Brown* 2 Beav. 180.